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CASE COMMENTS

THE TRANSFER OF JUVENILES TO CRIMINAL JURISDICTION: *STATE v. M. M.*

Since the turn of the century, children who run afoul of the law in the United States have come under the jurisdiction of statutorily created juvenile courts. Each of the fifty states has enacted legislation establishing juvenile justice systems, Illinois being the first in 1899. The goal of these statutes is to provide rehabilitation and treatment for youthful offenders rather than subjecting them to harsh conditions of incarceration with hardened adult criminals in penal institutions.¹

The overwhelming majority of states, however, have adopted statutory provisions for the transfer of juveniles to criminal jurisdiction for trial as adults in certain instances.² The two most common criteria for such a transfer are the age of the child charged with a crime and the nature of the offense he is alleged to have committed.³ A juvenile over age fifteen charged with a felony, for example, may be transferred to criminal jurisdiction in most states.

The West Virginia Legislature and the Supreme Court of Appeals have extensively altered the law governing transfer of juvenile defendants to criminal jurisdiction in recent years. *State v. M. M.*⁴ exemplifies the rapid changes in this area. M. M., the sixteen-year-old male defendant, was charged with the December 23, 1977, armed robbery⁵ of a New Martinsville service station and malicious assault⁶ of a law enforcement officer attempting to apprehend him.

Upon the youth's arrest, the Circuit Court of Wetzel County exercised its juvenile jurisdiction over M. M.⁷ The prosecuting at-

¹ P. PIERSMA, J. GANOUSIS, A. VOLENIK, H. SWANGER & P. CONNELL, *LAW AND TACTICS IN JUVENILE CASES* § 11.2 (3d ed. 1977).

² *Id.*

³ *Id.* at § 11.5.

⁴ 256 S.E.2d 549 (W. Va. 1979).

⁵ W. VA. CODE § 61-2-12 (1977 Replacement Vol.).

⁶ W. VA. CODE § 61-2-9 (Cum. Supp. 1979).

⁷ W. VA. CODE § 49-5-1 (Cum. Supp. 1979) provides that circuit courts have

torney then filed a motion to transfer the case to the court's criminal jurisdiction. The circuit court granted the motion at a transfer hearing and the juvenile appealed the decision to the West Virginia Supreme Court of Appeals. The high court reversed the order and remanded the case for another transfer hearing on two grounds: the state failed to show by clear and convincing proof that the accused child was not amenable to rehabilitation through the juvenile justice system,⁸ and prosecution witnesses at the original transfer hearing were improperly allowed to give opinion testimony as experts on the defendant's treatment prospects.⁹

Since the offenses occurred in 1977, the West Virginia Supreme Court of Appeals applied the 1977 juvenile transfer statute¹⁰ in deciding the appeal. The legislature, however, rewrote this statute in 1978,¹¹ and this revision will control similar cases arising in the future. Nevertheless, *State v. M. M.* sets forth the court's standard of review regarding the evidence needed to prove that a youthful offender has no reasonable prospects for rehabilitation within the juvenile court system. Moreover, the case establishes the test for qualification of a witness as an expert on juvenile rehabilitation. *State v. M. M.* will continue to have precedential value on these two issues.

I. JUVENILE TRANSFER CONSIDERATIONS

The West Virginia Legislature has amended the statute concerning transfer of a juvenile to criminal jurisdiction on several occasions in recent years. As noted earlier, because the crimes alleged to have been committed by the defendant in *State v. M. M.* occurred prior to the 1978 amendments, the 1977 transfer statute controlled the disposition of the case.¹² The 1978 revision applies

original jurisdiction over persons under the age of 19 years and who were under the age of 18 years at the time of the alleged offense. Magistrate courts have concurrent jurisdiction with circuit courts over persons under age 18 charged with violations of state traffic laws.

⁸ 256 S.E.2d at 555.

⁹ *Id.* at 554.

¹⁰ W. VA. CODE § 45-5-10 (1977) (amended 1978).

¹¹ W. VA. CODE § 49-5-10 (Cum. Supp. 1979).

¹² *Gibson v. Bechtold*, 245 S.E.2d 258 (W. Va. 1978). The court held in this case involving a 15-year-old charged with armed robbery that the 1977 amendments to W. VA. CODE § 49-5-10 apply to acts allegedly committed prior to those amendments' effective date, as well as to acts occurring thereafter but prior to the

to cases in which the alleged criminal acts were committed after the effective date of those amendments.¹³

Under the 1977 statute, no provision was included for transferring a child under age sixteen from the juvenile jurisdiction to the criminal jurisdiction of the circuit court. For a juvenile age sixteen or over the prosecuting attorney or the court itself could move to transfer the child to criminal jurisdiction if he or she were charged with an offense, which, if committed by an adult, would be a felony.¹⁴ The movant was required to state the grounds on which the transfer was sought, and the motion had to be served upon the child, his parents or custodians and the child's counsel at least seventy-two hours prior to the preliminary hearing in the case.¹⁵ Before the court could order a transfer the petitioner was required to show by clear and convincing proof that (1) the offense allegedly committed by the juvenile was one of violence or an offense which evidenced conduct endangering the public, and (2) there were no reasonable prospects for rehabilitating the child through resources available to the court under chapter forty-nine, article five of the West Virginia Code.¹⁶

The 1978 amendments revised the statute to permit juvenile criminal defendants to be tried as adults in a broader range of situations. This revision provides separately for transfer to criminal jurisdiction of that class of juveniles sixteen and over and those under age sixteen. The recent amendments require transfer from a juvenile proceeding to criminal jurisdiction of a child age sixteen or over who demands such a transfer.¹⁷ In addition, the current statute authorizes transfer of such a child to criminal jurisdiction if he is accused of an offense of violence to the person

effective date of the 1978 revision of the juvenile transfer statute. The 1977 amendments were enacted April 5 of that year, effective 90 days from passage.

¹³ State v. Bannister, 250 S.E.2d 53 (W. Va. 1978). In this case a 16-year-old male was charged with killing his father. The court held that the 1978 amendments to the juvenile transfer statute did not apply to the case, because the alleged crime was committed before the effective date of those amendments. The 1978 amendments to W. VA. CODE § 49-5-10 were enacted on March 11 of that year, effective 90 days from passage.

¹⁴ W. VA. CODE § 49-5-10 (1977) (amended 1978).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ W. VA. CODE § 49-5-10(c) (Cum. Supp. 1979).

which would be a felony if committed by an adult.¹⁸ The amended statute also permits transfer of a child age sixteen or over accused of a felony not involving violence to the person, if the juvenile defendant has been previously adjudged delinquent for committing a felony.¹⁹

In regard to a juvenile under age sixteen, the 1978 statutory revision authorizes transfer of such a child to criminal jurisdiction if he is accused of committing certain enumerated felonies to be discussed below.²⁰ A child under age sixteen may also be transferred to criminal jurisdiction if (1) he is accused of a felony offense of violence to the person and has been previously adjudged delinquent for committing such an offense,²¹ or (2) he has allegedly committed a felony not involving violence to the person but has *twice* been previously adjudged delinquent for committing felonies.²²

Except in a case where a defendant age sixteen or over demands transfer to criminal jurisdiction, the current statute permits transfer of a juvenile to be tried as an adult only upon the written motion of the prosecuting attorney. The burden of proof remains on the prosecution to establish grounds for transfer by presenting clear and convincing proof that the child is not amenable to rehabilitation through the juvenile justice system.²³ However, at the transfer hearing if the court has probable cause to believe that the accused child has committed treason,²⁴ murder,²⁵ armed robbery,²⁶ kidnapping,²⁷ first degree arson,²⁸ or first degree sexual assault,²⁹ the child may be transferred to criminal jurisdiction without further inquiry after consideration has been given to his background and personal characteristics.³⁰

¹⁸ *Id.* § 49-5-10(d)(4).

¹⁹ *Id.* § 49-5-10(d)(5).

²⁰ *Id.* § 49-5-10(d)(1).

²¹ *Id.* § 49-5-10(d)(2).

²² *Id.* § 49-5-10(d)(3).

²³ *Id.* § 49-5-10(a).

²⁴ W. VA. CODE § 61-1-1 (1977 Replacement Vol.).

²⁵ *Id.* §§ 61-2-1 to -3.

²⁶ *Id.* § 61-2-12.

²⁷ *Id.* § 61-2-14a.

²⁸ *Id.* § 61-3-1.

²⁹ *Id.* § 61-8B-3.

³⁰ W. VA. CODE § 49-5-10(a) (Cum. Supp. 1979). The 1978 amendments to W. VA. CODE § 49-5-10 are construed in *State v. Laws*, 251 S.E.2d 769 (W. Va. 1978).

The 1977 and 1978 juvenile transfer statutes contain certain similar provisions. Both require the court directing the transfer of an accused child to criminal jurisdiction to state on the record the findings of fact and conclusions of law upon which its transfer decision is based, or to incorporate such findings and conclusions within the transfer order.³¹ The two statutes also provide the juvenile the right to appeal a transfer order to the state supreme court,³² with the 1978 revision setting forth in detail the procedure by which such an appeal must be pursued.

In addition to the aforementioned differences in the provisions of the 1977 and 1978 transfer statutes, the 1977 enactment prohibited waiver of a transfer hearing by the child's counsel, specifying that failure to object to a transfer did not constitute a waiver.³³ The statute allowed for continuance of the transfer hearing for at least five days to allow the defendant's attorney to prepare for the hearing, if the child's counsel was appointed at the preliminary hearing.³⁴

In this case the first-degree murder convictions of two 15-year-old males were reversed, and the West Virginia Supreme Court of Appeals held that the 1978 revision of W. VA. CODE § 49-5-10 would apply to these defendants upon retrial, although the case was reversed on other grounds.

³¹ Compare W. VA. CODE § 49-5-10(e) (Cum. Supp. 1979) with W. VA. CODE § 49-5-10(c) (1977).

³² Compare W. VA. CODE § 49-5-10(f) (Cum. Supp. 1979) with W. VA. CODE § 49-5-10(c) (1977).

³³ W. VA. CODE § 49-5-10(b) (1977).

³⁴ *Id.* § 49-5-10(a). The 1977 enactment of W. VA. CODE § 49-5-10 provided in its entirety:

(a) Upon motion of the prosecuting attorney, the recommendation of the referee or upon its own motion, the court may at the time specified in section nine of this article transfer to a criminal proceeding the case of a child who is alleged to have committed, on or after his sixteenth birthday, an offense which, if committed by an adult, would be a felony if there is clear and convincing proof that: (1) The offense allegedly committed by the child is one of violence or evidences conduct which constitutes a substantial danger to the public; and (2) there are no reasonable prospects for rehabilitating the child through resources available to the court under this article. With reference to such rehabilitation prospects the court shall consider the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and the like. The burden of proof of such determination shall rest on the petitioner.

Such motion shall state the grounds for seeking the transfer from a juvenile proceeding to a criminal proceeding and the consequences of

The 1978 amendments to the transfer statute are silent on these points. However, these amendments do include two provisions not expressed in the 1977 enactment. The revised statute provides that any transfer hearing shall be held within seven days after a transfer motion is filed, unless it is continued for good cause.³⁵ Furthermore, no inquiry shall be made by or before the court concerning admission or denial of the crimes charged or the demand for a jury trial until the court reaches a decision on whether to transfer the accused child to criminal jurisdiction.³⁶

such transfer and shall be served upon the child, his parents or custodians and the child's counsel not less than seventy-two hours before the preliminary hearing. If the child's counsel is appointed at the preliminary hearing, the court or referee shall continue the hearing for at least five days to allow counsel to prepare for the transfer hearing unless counsel indicates that he is prepared to proceed. Testimony of a child at a transfer hearing shall not be admissible in a criminal proceeding or at the adjudicatory hearing under this article.

(b) Counsel for the child cannot waive the hearing on transfer on behalf of the child. Failure to object to the transfer shall not constitute a waiver.

(c) If the court transfers the case to a criminal proceeding, the court's findings of fact and conclusions of law shall be incorporated within the order. The child shall have the right to appeal to the supreme court of appeals from this order.

³⁵ W. VA. CODE § 49-5-10(a) (Cum. Supp. 1979).

³⁶ *Id.* § 49-5-10(b). The 1978 revision of W. VA. CODE § 49-5-10 provides in full:

(a) Upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing and with reasonable notice to the child, the parents, guardians, or custodians of the child, and the child's counsel, the court shall conduct a hearing to determine if juvenile jurisdiction should be waived and the proceeding should be transferred to the criminal jurisdiction of the court. Any motion filed in accordance with this section shall state, with particularity, the grounds for the requested transfer, including the grounds relied upon set forth in subsection (d) of this section, and the burden shall be upon the State to establish such grounds by clear and convincing proof. Any hearing held under the provisions of this section shall be held within seven days of the filing of the motion for transfer unless it is continued for good cause.

(b) No inquiry relative to admission or denial of the allegations of the charge or the demand for jury trial shall be made by or before the court until a decision shall have been made relative to whether the proceeding is to be transferred to criminal jurisdiction.

(c) The court shall transfer a juvenile proceeding to criminal jurisdiction if a child who has attained the age of sixteen years shall make a demand on the record to be transferred to the criminal jurisdiction of the

The 1977 and 1978 transfer statutes list the same factors to be

court. Such cases may then be referred to a magistrate for trial, if otherwise cognizable by a magistrate.

(d) The court may, upon consideration of the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors, transfer a juvenile proceeding to criminal jurisdiction if there is a probable cause to believe that:

(1) The child has committed the crime of treason under section one [§ 61-1-1], article one, chapter sixty-one of this Code; the crime of murder under sections one, two and three [§§ 61-2-1, 61-2-2 and 61-2-3], article two, chapter sixty-one of this Code; the crime of robbery involving the use or presenting of firearms or other deadly weapons under section twelve [§ 61-2-12], article two, chapter sixty-one of this Code; the crime of kidnapping under section fourteen-a [§ 61-2-14a], article two, chapter sixty-one of this Code; the crime of first degree arson under section one [§ 61-3-1], article three, chapter sixty-one of this Code; or charging sexual assault in the first degree under section three [§ 61-8B-3], article eight-B, chapter sixty-one of this Code, and in such case, the existence of such probable cause shall be sufficient grounds for transfer without further inquiry; or

(2) A child has committed an offense of violence to the person which would be a felony if the child were an adult: Provided, that the child has been previously adjudged delinquent for the commission of an offense which would be a violent felony if the child were an adult; or

(3) A child has committed an offense which would be a felony if the child were an adult: Provided, that the child has been twice previously adjudged delinquent for the commission of an offense which would be a felony if the child were an adult; or

(4) A child, sixteen years of age or over, has committed an offense of violence to the person which would be a felony if committed by an adult; or

(5) A child, sixteen years of age or over, has committed an offense which would be a felony if committed by an adult: Provided, that such child has been previously adjudged delinquent for an offense which would be a felony if the child were an adult.

(e) If, after a hearing, the court directs the transfer of any juvenile proceeding to criminal jurisdiction, it shall state on the record the findings of fact and conclusions of law upon which its decision is based or shall incorporate such findings of fact and conclusions of law in its order directing transfer.

(f) The child shall have the right to directly appeal an order of transfer to the supreme court of appeals of the State of West Virginia: Provided, that notice of intent to appeal and a request for transcript be filed within ten days from the date of the entry of any such order and the petition for appeal shall be presented to the supreme court of appeals within forty-five days from the entry of such order, and that, in default thereof, the right of appeal and the right to object to such order

evaluated by the court in rendering a decision on transferring a juvenile to criminal jurisdiction. These considerations include the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors.³⁷ The West Virginia Supreme Court of Appeals, in a 1977 case, held that these considerations enumerated by statute "need not be the only criteria"³⁸ used by the court to determine whether the juvenile should be transferred to criminal jurisdiction. The court may also take into account the child's age, the gravity of the alleged offense, the element of violence in the charged offense, whether the alleged crime was against person or property, possible justifications for the act and previous acts of delinquency by the child.³⁹ Continuing this trend in *State v. M. M.*, the court reversed the transfer order on the ground that, due to insufficient evidence with regard to the factors set forth in the statute, the state failed to show by clear and convincing proof that the accused child could not be rehabilitated through the juvenile justice system and should therefore be transferred to criminal jurisdiction.⁴⁰

In addition to these personal factors and elements relating to

of transfer shall be waived and may not thereafter be asserted. The provisions of article five [§ 58-5-1 et seq.], chapter fifty-eight of this Code pertaining to the appeals of judgments in civil actions shall apply to appeals under this chapter except as herein modified. The judge of the circuit court may, prior to the expiration of such period of forty-five days, by appropriate order, extend and re-extend such period for such additional period or periods, not to exceed a total extension of sixty days, as in his opinion may be necessary for preparation of the transcript: Provided, that the request for such transcript was made by the party seeking appeal within ten days of entry of such order of transfer. In the event any such notice of intent to appeal and request for transcript be timely filed, proceedings in criminal court shall be stayed upon motion of the defendant pending final action of the supreme court of appeals thereon.

³⁷ W. VA. CODE § 49-5-10(d) (Cum. Supp. 1979); W. VA. CODE § 49-5-10(a) (1977).

³⁸ *State ex rel. Smith v. Scott*, 238 S.E.2d 223, 226 (W. Va. 1977). The West Virginia Supreme Court of Appeals awarded a writ of prohibition in this case preventing the transfer of a 17-year-old juvenile charged with grand larceny to criminal jurisdiction, on the ground that the record of the child's transfer hearing was barren of relevant data providing a proper foundation for the transfer order.

³⁹ *Id.*

⁴⁰ 256 S.E.2d at 555.

the offense with which the juvenile is charged, the decision in *State v. M. M.* dictates that the court must consider "every feasible alternative to which [it] could possibly refer the juvenile"⁴¹ before transferring him to criminal jurisdiction. A number of alternatives for rehabilitating youthful offenders are specified by statute.⁴² However, Justice McGraw, writing for the majority of

⁴¹ *Id.*

⁴² W. VA. CODE § 49-5-13 (Cum. Supp. 1979). The applicable subsections provide:

(b) Following the adjudication, the court shall conduct the dispositional proceeding, giving all parties an opportunity to be heard. In disposition the court shall not be limited to the relief sought in the petition and shall give precedence to the least restrictive of the following alternatives consistent with the best interests and welfare of the public and the child:

(1) Dismiss the petition;

(2) Refer the child and the child's parent or custodian to a community agency for needed assistance and dismiss the petition;

(3) Upon a finding that the child is in need of extra-parental supervision (a) place the child under the supervision of a probation officer of the court or of the court of the county where the child has its [sic] usual place of abode, or other person while leaving the child in custody of his parent or custodian and (b) prescribe a program of treatment or therapy or limit the child's activities under terms which are reasonable and within the child's ability to perform;

(4) Upon a finding that a parent or custodian is not willing or able to take custody of the child, that a child is not willing to reside in the custody of his parent or custodian, or that a parent or custodian cannot provide the necessary supervision and care of the child, the court may place the child in temporary foster care or temporarily commit the child to the state department or a child welfare agency.

(5) Upon a finding that no less restrictive alternative would accomplish the requisite rehabilitation of the child, and upon an adjudication of delinquency pursuant to subdivision (1), section four [§49-1-4], article one of this chapter, commit the child to an industrial home or correctional institution for children. Commitments shall not exceed the maximum term for which an adult could have been sentenced for the same offense, with discretion as to discharge to rest with the director of the institution, who may release the child and return him to the court for further disposition;

(6) Upon an adjudication of delinquency pursuant to subsection (3) or (4), section four [§49-1-4], article one of this chapter, and upon a finding that the child is so totally unmanageable, ungovernable, and antisocial that the child is amenable to no treatment or restraint short of incarceration, commit the child to a rehabilitative facility devoted exclusively to the custody and rehabilitation of children adjudicated delinquent pursuant to said subsection (3) or (4). Commitments shall not ex-

the court, declared in a footnote to *State ex rel. E. D. v. Aldredge* that this statutory list of juvenile treatment alternatives is not "exhaustive."⁴³ In *State v. M. M.* the court observed:

The State is charged with producing clear and convincing proof there are no programs, facilities or institutions available to the court which would offer reasonable prospects for rehabilitating the juvenile. . . . With regard to the availability of facilities the inquiry may not be arbitrarily limited to the county in which the proceedings occur, or even to this State.⁴⁴

Two cases cited in a footnote to the decision in *State v. M. M.*,⁴⁵ *In re Welfare of J. E. C. v. State*⁴⁶ and *State ex rel. Harris v. Calendine*,⁴⁷ shed light on the rationale that the court should not limit its inquiry on juvenile rehabilitation alternatives to facilities within the state. While neither of these decisions mentioned the possibility of referring a juvenile to an out-of-state treatment facility, the courts in both cases discussed the feasibility of developing additional programs within their respective jurisdictions to rehabilitate youthful offenders.

Welfare of J. E. C. involved a seventeen-year-old male charged with aggravated robbery. Here the Supreme Court of Minnesota held that although no program existed or had been

ceed the maximum period of one year with discretion as to discharge to rest with the director of the institution, who may release the child and return him to the court for further disposition; or

(7) After a hearing conducted under the procedures set out in subsections (c) and (d), section four [§27-5-4], article five, chapter twenty-seven of the Code, commit the child to a mental health facility in accordance with the child's treatment plan; the director may release a child and return him to the court for further disposition.

(e) Notwithstanding any other provision of this Code to the contrary, in the event a child charged with delinquency under this chapter is transferred to adult jurisdiction and there tried and convicted, the court may nevertheless, in lieu of sentencing such a person as an adult, make its disposition in accordance with this section.

⁴³ 245 S.E.2d 849, 851 n.2 (W. Va. 1978).

⁴⁴ 256 S.E.2d at 555.

⁴⁵ *Id.* at n.3.

⁴⁶ 302 Minn. 387, 225 N.W.2d 245 (1975). For an analysis of this case see Developments, *Juvenile Law: Decision to Refer Juvenile Offenders for Criminal Prosecutions as Adults to Be Made on Basis of "State of the Art" of Juvenile Corrections*, 60 MINN. L. REV. 1097 (1976).

⁴⁷ 233 S.E.2d 318 (W. Va. 1977).

designed which could rehabilitate the teenaged defendant with adequate protection for the public, this factor did not justify the lower court's finding that the child was unsuitable for treatment within the juvenile justice system. The court remanded the case for a comprehensive hearing on whether there was any program then available to rehabilitate the accused child and other hard-core delinquents, whether it would be possible or feasible to formulate an effective treatment program for the child, why the state department of corrections had failed to develop such a program, and whether any rehabilitative program for treatment of hard-core delinquents was then available under the adult criminal justice system.⁴⁸

The *Harris* case adjudicated the rights of juvenile status offenders⁴⁹ in West Virginia. In this decision Justice Neely, writing for the majority of the court, pronounced the proper test for committing these offenders for treatment and noted the competing interests which affect the availability of juvenile rehabilitation programs:

Consequently, the standard which the juvenile court must apply is not a standard of what facilities are *actually* available in the State of West Virginia for the treatment of juvenile status offenders, but rather a standard which looks to what facilities *could reasonably be made* available in an enlightened and humane state solicitous of the welfare of its children but also mindful of other demands upon the State budget for humanitarian purposes.⁵⁰

While the court apparently considered the lack of this type of

⁴⁸ 302 Minn. at 400, 225 N.W.2d at 253. Upon remand, the juvenile court determined that no actual or feasible program was available which could protect the public and rehabilitate J. E. C. prior to his twenty-first birthday. Therefore, in *In Re Welfare of I. Q. S.*, 309 Minn. 78, 90, 244 N.W.2d 30, 40 (1976), the Supreme Court of Minnesota affirmed the order of the juvenile court transferring J. E. C. for prosecution as an adult. However, the court stated, "[W]e invite the legislature's continuing attention to the court's findings regarding the availability and feasibility of correctional programs for its classification of 'hard-core' youths in need of secure treatment facilities."

⁴⁹ A juvenile status offender, as defined by W. VA. CODE § 49-5B-3(3) (Cum. Supp. 1979), is a juvenile who has been charged with delinquency or adjudicated a delinquent for conduct which would not be a crime if committed by an adult. Truancy is an example of a juvenile status offense.

⁵⁰ 233 S.E.2d at 331.

evidence crucial to the state's case, the outcome of *State v. M. M.* apparently would have been different, however, if the case had been controlled by the 1978 juvenile transfer statute. The child in the case was charged with armed robbery, one of the six felonies specified in the 1978 statutory amendments as justifying transfer to criminal jurisdiction without further inquiry if the court has considered the child's background and personal characteristics, and if the court has probable cause to believe that the juvenile has committed the alleged offense.⁵¹ In *State v. M. M.*, therefore, opinion testimony by prosecution witnesses regarding the juvenile's rehabilitation prospects would not have been necessary, and the transfer order of the circuit court would not have been reversed on the ground that such testimony was improperly admitted. Furthermore, the specific provision in the 1978 statute governing transfer of a juvenile charged with armed robbery moots the holding in *State v. M. M.* that the circuit court placed undue emphasis on the violent nature of the alleged offense in transferring the child to criminal jurisdiction.⁵²

II. EXPERT TESTIMONY ON JUVENILE REHABILITATION

The transfer order in *State v. M. M.* was reversed on the second ground that prosecution witnesses were erroneously permitted to give opinion testimony as experts regarding the accused child's prospects for rehabilitation within the juvenile justice system.⁵³ The West Virginia Supreme Court of Appeals held that under the facts of the case, the county sheriff and state trooper who arrested the child and the juvenile probation worker assigned to the case were not experts on juvenile rehabilitation.⁵⁴ In allowing these individuals to state opinions on the teenaged defendant's prospects for successful treatment within the juvenile justice system, the circuit court applied the test that the witnesses had "some peculiar qualification or more knowledge than jurors are ordinarily supposed to have."⁵⁵ The supreme court held this rule to be insufficient when dealing with "complex matters of human behavior" and more appropriate for opinion testimony as to value, quantity

⁵¹ W. VA. CODE § 49-5-10(d)(1) (Cum. Supp. 1979).

⁵² 256 S.E.2d at 556.

⁵³ 256 S.E.2d at 553-55.

⁵⁴ *Id.*

⁵⁵ 256 S.E.2d at 553.

or damages to the value of land.⁵⁶

According to the decision in *State v. M. M.*, the correct test for qualifying a witness as an expert on juvenile rehabilitation is that the individual "must, through training, education or practical experience, possess significant skill and knowledge regarding the rehabilitation of juveniles."⁵⁷ This standard reiterates a long-standing rule of evidence in West Virginia⁵⁸ that the courts will continue to follow in reviewing future juvenile transfer orders.

The decision in *State v. M. M.* also requires a person qualifying as an expert witness on juvenile rehabilitation to have adequate knowledge of the accused child's background to properly assess the youth's individual potential for treatment.⁵⁹ Writing for the majority of the court in *State v. M. M.*, Justice McGraw acknowledged the stringency of this standard for expert testimony on juvenile rehabilitation. He pointed out, however, that the state's burden of clear and convincing proof could theoretically "be met by the testimony of a single expert witness familiar with the full range of treatment alternatives and thoroughly acquainted with the juvenile."⁶⁰

In two other recent juvenile cases the West Virginia Supreme Court of Appeals sanctioned expert testimony on a child's rehabilitation prospects given by psychiatrists⁶¹ and by a juvenile probation worker and a psychologist employed at a county mental health facility.⁶² In *State ex rel. C. A. H. v. Strickler* the expert

⁵⁶ *Id.* For application of the test in the proper situation, *See, e.g.,* *Cochran v. Appalachian Power Co.*, 246 S.E.2d 624 (W. Va. 1978); *Ellison v. Wood & Bush Co.*, 153 W. Va. 506, 170 S.E.2d 321 (1969); *Overton v. Fields*, 145 W. Va. 797, 117 S.E.2d 598 (1960); *Toppins v. Oshel*, 141 W. Va. 152, 89 S.E.2d 359 (1955); *Stenger v. Hope Natural Gas Co.*, 139 W. Va. 549, 80 S.E.2d 889 (1954); *Lively v. Virginian Railway Co.*, 104 W. Va. 335, 140 S.E. 51 (1927); *Cochran v. Craig*, 88 W. Va. 281, 106 S.E. 633 (1921); *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 35 S.E. 973 (1900).

⁵⁷ 256 S.E.2d at 554.

⁵⁸ *See, e.g.,* *Snodgrass v. Weaver*, 120 W. Va. 444, 199 S.E. 1 (1938); *Redd v. Carnahan*, 65 W. Va. 330, 64 S.E. 138 (1909); *Sebrell v. Barrows*, 36 W. Va. 212, 14 S.E. 996 (1892); *McKelvey Adm'x The Chesapeake & Ohio Ry. Co.*, 35 W. Va. 500, 14 S.E. 261 (1891).

⁵⁹ 256 S.E.2d at 554.

⁶⁰ *Id.* at 555.

⁶¹ *State v. Bannister*, 250 S.E.2d 53 (W. Va. 1978).

⁶² *State ex rel. C. A. H. v. Strickler*, 251 S.E.2d 222 (W. Va. 1979). This case involved a female juvenile status offender committed to the West Virginia Indus-

testimony of the child's probation officer met with approval by the court because the probation worker filed a report fully exploring the disposition alternatives provided by statute.⁶³

The supreme court of appeals held in *State v. M. M.*, however, that the opinion of the juvenile probation worker did not satisfy the state's requisite burden of proof that the youthful defendant was not suited for treatment within the juvenile court system. The case worker had been assigned to supervise M. M.'s probation following a September, 1977, petit larceny charge. She confined her testimony at the youth's transfer hearing on the subsequent armed robbery and malicious assault charges to juvenile treatment alternatives in Wetzel County alone. The probation worker stated that she had tried "every other alternative" to rehabilitate the child, but in reality, she specified only continued probation within the county as her attempt to treat the teenager. The probation officer had never visited any state juvenile facility, and no evidence was presented at the transfer hearing to show that she had any training or education qualifying her to offer expert testimony on the accused child's rehabilitation potential.⁶⁴

The sheriff and state trooper who testified at M. M.'s transfer hearing also failed to meet the high court's standard for qualifying as expert witnesses on juvenile rehabilitation. Each man had only limited or superficial contact with the juvenile treatment facilities about which he expressed an opinion, and each lacked education, training or experience in the area of juvenile rehabilitation. The court found that even if the law enforcement officers had met these criteria, they lacked adequate personal knowledge of the youthful defendant's background to offer opinion testimony on his treatment prospects. Furthermore, the testimony by other witnesses at the transfer hearing resulted in insufficient facts upon which the peace officers' opinions could properly have been

trial Home for Girls at Salem. The Supreme Court of Appeals awarded a writ of prohibition holding that the circuit court had exceeded its lawful jurisdiction by committing the relator to the Salem facility, a prison-like institution housing exclusively juveniles adjudicated delinquent for committing criminal offenses.

⁶³ W. VA. CODE § 49-5-13 (Cum. Supp. 1979). See note 43 *supra*. For a discussion of the use of social reports as evidence at juvenile transfer hearings see Note, *Juvenile Waiver Hearings and the Hearsay Rule—The Need for Reliable Evidence at the Critical Stage*, 12 VAL. L. REV. 397, 414-24 (1978).

⁶⁴ 256 S.E.2d at 554-55.

based.⁶⁵

The court's decisions in *M. M.* and *Strickler* read together appear to require generally a case by case determination of who is qualified to give expert testimony regarding a juvenile's prospects for rehabilitation. Determination of who has the requisite expertise to state an opinion on the juvenile's treatment prospects must be based on a realistic appraisal of available personnel reasonably familiar with both the accused child and the feasible alternatives for rehabilitating him.

Under the 1978 amendments to the juvenile transfer statute, expert testimony regarding the youthful offender's treatment potential will not be necessary at every transfer hearing. The statute requires the court to consider the accused child's background and personal traits before transferring him to criminal jurisdiction. After evaluating these factors, however, if the court has probable cause to believe that the child has committed one of the six felonies enumerated in the statute, it may transfer the juvenile to criminal jurisdiction without further inquiry.⁶⁶ In this instance the court need not hear testimony regarding the child's prospects for rehabilitation within the juvenile justice system. Such evidence is still essential, however, in cases involving juveniles charged with crimes other than these six felonies.

III. CONCLUSION

The lasting impact of *State v. M. M.* is found in the standard which the decision establishes for qualifying a witness as an expert on a youthful criminal defendant's rehabilitation prospects and in the factors the case sets forth as considerations in the decision to transfer a juvenile to criminal jurisdiction. Only in a limited range of cases, those involving the six felonies specified in the 1978 amendments to the transfer statute, may the court forego consideration of the accused child's rehabilitation potential and transfer the juvenile for trial as an adult after taking into account his personal background and the nature of the crime with which he is charged. In all other cases the court must base its transfer decision on the type and quantum of evidence sanctioned in *State v. M. M.* regarding the youthful defendant's treatment prospects

⁶⁵ *Id.* at 554.

⁶⁶ W. VA. CODE § 49-5-10-(d)(1) (Cum. Supp. 1979).

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within the juvenile justice system.

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